In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 593

A. H. KARPE, PETITIONER

v.

THE UNITED STATES AND BIRDA M. VIERA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

During 1944, petitioner and his wife derived income from a business owned by petitioner. Under California law, the portion of the income attributable to the business assets was petitioner's separate property, while the portion attributable to his services was community property. In their separate income tax returns filed for that year, petitioner and his wife treated only 30.8% of the business income as community property, with the petitioner thus reporting 84.6% of the income and his wife reporting only 15.4%.[1] Petitioner later sued for refund, contending

[1] Deficiencies arising from omitted items of business income were later assessed and paid on the same basis.

that a larger part of the business income was community property and, hence, that a smaller part of it was taxable to him. Sustaining his contention in part, the district court determined that 49.2% of the business income was community property and, hence, that only 75.4% of it was taxable to petitioner, the remaining 24.6% being taxable to his wife. The judgment in that suit became final in February 1957. Six months later, the Commissioner determined a deficiency against petitioner's wife, increasing her income by the amount of the business income (11.2%) which was determined to have been erroneously included in petitioner's income. At that time, the normal period of limitations for the assertion of a deficiency against the wife had expired. The sole question is whether the notice of deficiency was timely under the provisions of the Internal Revenue Code (§§ 1311–1314) raising the bar of the statute of limitations in certain circumstances when an item of income has been treated inconsistently by related taxpayers.[2]

If related taxpayers report income on one basis and one of them later obtains a refund judgment premised upon the treatment of an item inconsistent with the way it was originally treated, the Commissioner is generally allowed one year from the date of the judgment within which to determine a compensating deficiency against the related taxpayer (§§ 1311–1314).

[2] The resulting assessment against his wife was deducted from the refund due petitioner because of his undertaking, in a divorce settlement agreement, to pay his wife's taxes, but no question is raised here as to petitioner's liability for the amount in issue if the assessment was not barred by limitations.

Petitioner and his wife were admittedly "related taxpayers" for that purpose (§ 1313(c)), and the notice of deficiency was admittedly timely if:

> The determination [made by the district court in 1957] require[d] the exclusion from gross income of an item included in a return filed by the taxpayer [petitioner] or with respect to which tax was paid and which was erroneously excluded or omitted * * * from the gross income of a related taxpayer [his wife]; * * * [§ 1312(3)(A)]

and if the district court, in its determination, "adopted * * * a position maintained by the taxpayer" in that proceeding (§ 1311(b)(1)(B)).

Petitioner contends[3] (1) that the portion of the business income which the district court in 1957 held had been erroneously included in his income and should have been included in his wife's was not an "item" of income within the meaning of § 1312(3)(A) (which he contends is limited to specific units of income separately entered on the return, such as a dividend on particular stock); and (2) that, since the district court allocated the business income between separate property and community property by a somewhat less favorable formula than that urged by petitioner, it did not "adopt" the "position" "maintained" by him within the meaning of § 1311(b)(1)(B). The arguments are frivolous on their face and were properly rejected by the Court of Claims. No

[3] At least he so contended in the court below. His petition here does not say what substantive questions he means to raise

conflict on the substantive questions is even claimed, and the asserted difference between the Court of Claims and other courts in applying a "liberal" rather than a "strict" rule of construction to the mitigation provisions is beside the point. Not only does the rejection of petitioner's insubstantial arguments not turn upon such intangible differences of approach, but such a difference would not in any event constitute a "conflict" of decisions of the sort required for review here.

Petitioner's final argument that the mitigation provisions were not properly pleaded or otherwise placed in issue was adequately and fully answered by the Court of Claims (Pet. App. 7–8). Not only is the Tax Court decision cited by petitioner (Pet. 14–18) not in point, but a conflict with the Tax Court is not a ground for review here.

The petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: '964